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## COMMENT

### TIME STANDARDS: CHANGING THE ROLE OF FLORIDA JUDGES BY JUDICIAL FIAT

RICHARD W. MOORE

ON MAY 14, 1986, the Supreme Court of Florida adopted for the first time a Rule of Judicial Administration establishing time standards for disposing of cases in trial and appellate courts.<sup>1</sup> The most controversial issues addressed by the rule involve the time standards<sup>2</sup> for civil litigation and case control by the trial judge. Section 2.085(d)(1)(B) establishes an eighteen-month filing to final disposition time frame for civil jury trials and a twelve-month time frame for civil nonjury trials.<sup>3</sup> Section 2.085(b) directs all trial judges to take control of the progress of cases early in the litigation process.<sup>4</sup> The rule was narrowly approved by a four to three vote of the court.<sup>5</sup>

The controversy over Rule 2.085 is evident from the opinions accompanying the rule. Ostensibly, the majority opinion justifies the rule as an effort to combat court delay.<sup>6</sup> The dissent denies that delay is a problem and characterizes the rule as intrusive.<sup>7</sup> Rhetoric aside, the rule and accompanying opinions are vehicles for mandating a dramatic transformation of the judicial role. Judges once neutral and passive become managerial overseers, controlling all

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1. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423 (Fla. 1986).

2. In this Comment, "time standards" is used generically to refer to court-imposed time limits for the disposition of cases aimed at reducing court delay.

3. FLA. R. JUD. ADMIN. 2.085. Rule 2.085(d) establishes time standards for every type of trial court and for courts of appeal, including the Florida Supreme Court. Time standards enunciated for trial courts are deemed "presumptively reasonable time period[s] for the completion of cases." *Id.*

4. *Id.* The rule provides that "[t]he trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps to monitor and control the pace of litigation . . . ." FLA. R. JUD. ADMIN. 2.085(b).

5. *Time Standards*, 493 So. 2d at 425. Chief Justice Boyd and Justices McDonald and Barkett concurred with the per curiam opinion. Justice Overton concurred specially with a separate opinion. Justice Shaw concurred with Justice Ehrlich's opinion concurring in part and dissenting in part. Justice Adkins dissented without an opinion. *Id.*

6. *Id.* at 423.

7. *Id.* at 427 (Ehrlich, J., dissenting).

aspects of their cases. Taken in context with the opinions and research regarding court delay or managerial judges, Rule 2.085 will affect every participant in the state judicial process. It is questionable, however, whether the rule will reduce court delay or improve the quality of justice in Florida. There is a risk that the rule will be found internally inconsistent. It may also defeat the new managerial judge philosophy by imposing rigid time standards.

In this Comment, the author examines Florida's implementation of the managerial judge philosophy. The author first traces the development of Rule 2.085. Next, the author analyzes the time standards adopted by other states and the model standards. The author will then present a brief analysis of the managerial judge philosophy, and examine whether rigid time standards help or hinder the implementation of that philosophy.

## I. FLORIDA TIME STANDARDS

The per curiam opinion adopting Rule 2.085 describes in detail the long, deliberate process which resulted in the time standards. The major players in the process included the Court Efficiency Committee, the Judicial Council of Florida, the Committee on Court Statistics and Workload and, of course, the Florida Supreme Court. A review of these committees' recommendations and their reasons for proposing trial court time standards is helpful in understanding the final product.

### A. *Evolution of the Time Standards*

The Committee on Court Statistics and Workload was one of the first committees to recommend time standards.<sup>8</sup> The Florida Supreme Court created the Committee to study and make recommendations for the establishment of judicial workload measures and improved statistics gathering procedures to be used in the judicial

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8. COMMITTEE ON COURT STATISTICS AND WORKLOAD, REPORT OF THE COMMITTEE ON COURT STATISTICS AND WORKLOAD (Nov. 1, 1984) (on file with State Courts Administrator, Florida Supreme Court) [hereinafter COMMITTEE REPORT]. The opinion might lead one to erroneously think that the Committee was one of the last entities to address trial court time standards. See *The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards)*, 493 So. 2d 423, 423 (Fla. 1986). The Committee's report was submitted to the court 18 months before the Court Efficiency Committee made nondocumented time standard recommendations to the Judicial Council of Florida on Mar. 20, 1985. JUD. COUNCIL OF FLA., 1985 ANN. REP. C-1 (Feb. 1, 1986) (minutes of Mar. 20, 1985) (on file with State Courts Administrator, Florida Supreme Court) [hereinafter COUNCIL ANNUAL REPORT].

certification process.<sup>9</sup> Adoption of time standards was one of the Committee's recommendations.<sup>10</sup>

The Committee did not recommend specific time standards, but suggested that the supreme court use as guides the standards proposed by the Conference of State Court Administrators and the American Bar Association's National Conference of State Trial Judges. It suggested that the court develop and adopt time standards by July 1, 1985, so the results could be used in the next certification process.<sup>11</sup>

The Committee's report specifically stated that time standards should serve "as an indicator of the existence of intolerable delay in a circuit or county court as a whole and is not a valid method to measure the performance of an individual judge."<sup>12</sup> Two members of the committee of ten dissented even to this minimal use of time standards, stating that time standards should not be used to indicate the need for additional judges.<sup>13</sup>

In addition to the time standards, the Committee recommended that the supreme court adopt some means of reporting case disposition times. The committee pointed out that the supreme court was required by statute to develop a uniform system for reporting case disposition times.<sup>14</sup> The lack of such a system was noted as a deficiency in a 1984 Auditor General's report.<sup>15</sup> The Committee logically noted that time standards were useless without some means to measure case disposition times.<sup>16</sup>

The 1984 Committee recommendations clearly influenced Florida's move toward time standards. The supreme court developed specific time standards which became effective July 1, 1985, by administrative order.<sup>17</sup> Reporting procedures for disposition times were mandated in an administrative order on September 20,

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9. COMMITTEE REPORT, *supra* note 8, at I-1, I-3 (minutes of Apr. 6, 1984). The judicial certification process is the procedure used by the Florida Supreme Court to determine the state's need for additional judges. FLA. R. JUD. ADMIN. 2.035. See FLA. CONST. art. V, § 9.

10. COMMITTEE REPORT, *supra* note 8, at 16.

11. *Id.*

12. *Id.* at 17.

13. *Id.* at A-4 (committee votes).

14. *Id.* at 17. See also FLA. STAT. § 25.075 (1985).

15. AUDITOR GEN., REPORT ON AUDIT OF THE SUPREME COURT OF FLORIDA FOR THE FISCAL YEAR ENDED JUNE 30, 1983, at 5 (May 31, 1984) (on file with Clerk, Florida Supreme Court).

16. COMMITTEE REPORT, *supra* note 8, at 18.

17. *In re* Time Standards for Trial and Appellate Courts, Fla. Admin. Order (Apr. 12, 1985) (on file with Clerk, Florida Supreme Court) [hereinafter Fla. Admin. Order of Apr. 12, 1985].

1985.<sup>18</sup> Both recommendations were incorporated into the final court rule. The court credited the Court Efficiency Committee with recommending specific time standards for the completion of cases.<sup>19</sup> Unfortunately, the Efficiency Committee proved to be a short-lived entity and its recommendations were never formally documented. In response to a recommendation by the Court Efficiency Committee, that committee was replaced in 1985 by the Judicial Council of Florida.<sup>20</sup> The Council was formed to address criticisms and suggestions with regard to judicial administration, recommend changes, and suggest specific tools for those changes.<sup>21</sup> The Council was concerned with time standards from the beginning. During the Council's first meeting, its members unanimously passed a motion endorsing the trial court time standards recommended by the Court Efficiency Committee.<sup>22</sup> No attempt was made at that meeting to define a purpose or offer a justification for the time standards.<sup>23</sup>

The supreme court acted quickly on the motion. Before any formal recommendation by the Council, Chief Justice Boyd issued an administrative order establishing time standards for both trial and appellate courts. The administrative order offered little explanation for the time standards except that they represented an initial step in making the courts more efficient and were recommended by the Court Efficiency Committee and the Council.<sup>24</sup> The standards enunciated in the administrative order were similar to the ones found in Court Rule 2.085.<sup>25</sup> The order became effective July 1, 1985.<sup>26</sup>

The supreme court, however, had put the cart before the horse. An administrative order had established time standards, but there was no requirement that trial courts report case disposition times. This oversight was remedied on September 20, 1985, when the su-

18. Fla. Admin. Order (Sept. 20, 1985) (on file with Clerk, Florida Supreme Court) [hereinafter Fla. Admin. Order of Sept. 20, 1985].

19. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423, 423 (Fla. 1986).

20. *In re* Amendment to Rules of Judicial Admin., 465 So. 2d 1217 (Fla. 1985).

21. COUNCIL ANNUAL REPORT, *supra* note 8, at i.

22. *Id.* at C-3 (minutes of Mar. 20, 1985).

23. *See id.* at C-1 to C-3.

24. Fla. Admin. Order of Apr. 12, 1985, *supra* note 17.

25. *Compare id.* with FLA. R. JUD. ADMIN. 2.085. Both require civil cases to meet an 18-month time limit for jury cases and a 12-month time limit for nonjury cases. The difference is that the administrative order measured the time from filing until the case went to trial. The rule measured the time from filing to final disposition. *Id.*

26. *See* Fla. Admin. Order of Apr. 12, 1985, *supra* note 17.

preme court issued an administrative order directing court clerks to report pending caseload data and to list separately cases exceeding the time standards.<sup>27</sup> The first of these reports was to be due February 28, 1986.<sup>28</sup>

The Council met for the last time in 1985 after the administrative order of September 20, 1985, was issued. During this meeting, Judge Hall<sup>29</sup> raised a practical problem with regard to the new reporting requirements. He pointed out that the legislature would have to provide additional money to the courts to fund the additional support personnel necessary to implement the time standard reporting requirements. Although raised, this issue was not further addressed at the meeting.<sup>30</sup>

### B. Supreme Court Adoption of the Rule

Although the supreme court's motivation for incorporating the two administrative orders into a court rule is not documented, one motive can be hypothesized. Administrative orders are created and destroyed by the power of the chief justice. A court rule, on the other hand, must be voted on by the entire court.<sup>31</sup> Thus, a court rule theoretically is a much more permanent directive than an administrative order. The court could have issued the rule to ensure continuity in the face of Chief Justice Boyd's retirement and the swearing in of a then unknown chief justice.

Before its adoption, the proposed rule<sup>32</sup> was sent to the chief judges of the state judicial circuits for their comments.<sup>33</sup> In addition, the proposed rule was sent to The Florida Bar Board of Gov-

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27. Fla. Admin. Order of Sept. 20, 1985, *supra* note 18. For civil cases exceeding the time standards, the report must list the case number, case style, type of case, and original filing date. *Id.* at 2.

28. *Id.*

29. Judge J. Lewis Hall, Jr., Second Judicial Circuit of Florida.

30. COUNCIL ANNUAL REPORT, *supra* note 8, at E-4 (minutes of Sept. 27, 1985).

31. See FLA. CONST. art. V, § 2(a) (supreme court shall adopt rules for practice and procedure in all courts); *Id.*, § 3(a) (concurrence of four justices required for decision). Read together, these sections require that rules adopted by the Florida Supreme Court be approved by at least four justices. By rule, the chief justice of the supreme court has the power to perform administrative duties as may be required but which are not otherwise provided by rule or law. This power includes the authority to issue and repeal administrative orders. FLA. R. JUD. ADMIN. 2.030(a)(2)(B)(iv).

32. Drafted by the Committee on Court Statistics and Workload at the direction of Chief Justice Boyd. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423, 423 (Fla. 1986).

33. Letter from Justice Rosemary Barkett to Judge M.C. Blanchard (Jan. 3, 1986) (on file, *Florida State University Law Review*).

ernors where it received an endorsement.<sup>34</sup> The 1986 Florida Judicial Council also endorsed the rule and recommended it for adoption.<sup>35</sup> Rule 2.085 was then published on May 14, 1986, as an amendment to Rule 2.050 of Judicial Administration.<sup>36</sup>

Rule 2.085 was not adopted unanimously. Four justices concurred in the per curiam opinion, and Justice Overton wrote a special concurrence. Justice Ehrlich, joined by Justice Shaw, concurred in part and dissented in part. Justice Adkins dissented without opinion.<sup>37</sup>

The majority's justification for Rule 2.085 may be summed up in two words: court delay. The majority noted that litigation delay affects the enterprises and important personal and professional decisions of litigants. Such "unwarranted delay," the majority reasoned, compelled adoption of the time standards contained in Rule 2.085.<sup>38</sup>

Rule 2.085, Time Standards for Trial and Appellate Courts, incorporates the time standards and reporting requirements found in the administrative orders of April 12, 1985, and September 20, 1985, with a few notable exceptions. First, the rule added sections defining the purpose of the time standards and mandating a strong policy favoring case control through active judicial management.<sup>39</sup> Subsection (b) states that "[t]he trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined."<sup>40</sup> Rule 2.085 does not merely establish comprehensive time standards. No longer only an evaluative tool, in a larger sense it is a full endorsement of the managerial judge as a judicial philosophy.

Secondly, although the stated time limits are the same for the rule and administrative order, the rule changes the time span measured by those limits. In the administrative order, the ending point

34. Letter and enclosures from John F. Harkness Jr. to Sid White (Apr. 2, 1986) (on file, *Florida State University Law Review*) (endorsed with minor modifications); The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423 (Fla. 1986).

35. Judicial Council of Florida, minutes of meeting at 3 (Mar. 13, 1986) (on file with state Courts administrator, Florida Supreme Court); *Time Standards*, 493 So. 2d at 423-24.

36. *Time Standards*, 493 So. 2d at 423.

37. *Id.* at 425.

38. *Id.* at 423.

39. FLA. R. JUD. ADMIN 2.085(a)-(b).

40. *Id.* 2.085(b). The rule enumerates several ways judges must take charge of cases: "(1) Assuming early and continuous control of the court calendar; (2) Identifying cases subject to alternative dispute resolution processes; (3) Developing rational and effective trial setting policies; (4) Giving older cases and cases of greater urgency priority in trial settings." *Id.*

for the time standard pertaining to civil jury trials was the trial date.<sup>41</sup> In the court rule, the ending point is final disposition of the case.<sup>42</sup> The practical effect of this change is a narrowing of the time standards. More procedures must be completed within the specified time periods, probably resulting in more cases exceeding the limits.

Finally, the administrative order cast the time standards as "goals, rather than absolute requirements,"<sup>43</sup> but the rule is unclear on this point. Adoption of Rule 2.085 established "a presumptively reasonable time period for the completion of cases in the trial and appellate courts of this state."<sup>44</sup> These reasonable time periods in civil cases are eighteen months from filing to final disposition for jury cases and twelve months for nonjury cases.<sup>45</sup> Although the rule states that "litigants and counsel shall be afforded a reasonable time to prepare and present their case,"<sup>46</sup> the rule's "presumptively reasonable" time periods indicate that application of the rule should be fairly rigid. This interpretation is further supported by the rule's requirement that judges apply a firm policy toward continuances. "Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge."<sup>47</sup> This language suggests that the time standards may be more rigid than mere goals.

No reasonable person would disagree with the court's statement that "the public is ill served by unwarranted delay."<sup>48</sup> However, the majority opinion neither defines "unwarranted delay" nor cites to evidence of widespread delay.<sup>49</sup> Although "court delay" was the ostensible impetus for the rule, the majority discussion of this problem took less than a paragraph.<sup>50</sup> The rest of the opinion deals with national recognition of time standards, the evolution of Flor-

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41. Fla. Admin. Order of Apr. 12, 1985, *supra* note 17.

42. FLA. R. JUD. ADMIN. 2.085(d)(1)(B).

43. Fla. Admin. Order of Apr. 12, 1985, *supra* note 17.

44. FLA. R. JUD. ADMIN. 2.085(d).

45. *Id.*

46. *Id.* 2.085(a).

47. *Id.* 2.085(c).

48. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423 (Fla. 1986).

49. The lack of empirical support for the rule may have been unavoidable. As late as May 14, 1984, the state auditor general pointed out that the courts were not reporting case dispositions as mandated by Florida statute. AUDITOR GEN., REPORT ON AUDIT OF THE SUPREME COURT OF FLORIDA FOR THE FISCAL YEAR ENDED JUNE 30, 1983, at 5 (May 31, 1984) (on file with Clerk, Florida Supreme Court).

50. *Time Standards*, 493 So. 2d at 423.



ida's time standards, and the mechanisms for reviewing Rule 2.085 in the future.<sup>51</sup>

Justice Ehrlich attacked the very concept of the time standards. The critical time, he reasoned, is not between the filing of a suit and final disposition, but between the time the case is ready for trial and when it actually goes to trial.<sup>52</sup> In his dissent, he also pointed out two concerns overlooked by the majority. First, the rule may be counterproductive. Judges spending more time on case control will have less time to try cases. Second, the new rule may increase costs to litigants. Extra time spent by attorneys reporting case progress to trial judges ultimately will be charged to clients.

Justice Ehrlich also dissented from the managerial judge philosophy imposed by the rule. "[T]he State of Florida has absolutely no interest in a law suit between two or more civil litigants, except to provide a forum and a procedure for fairly adjudicating conflicts between those parties."<sup>53</sup> Justice Ehrlich characterized the rule as "Big Brother" goading the parties with a "cattle prod."<sup>54</sup> Conceding that some cases may be delayed by "unlawyerlike" conduct, he maintained that existing rules and the inherent power of the trial judge can adequately deal with such cases. In short, Justice Ehrlich saw insufficient evidence of trial delay and believed less intrusive means were available to deal with whatever problems existed.

In closing, Justice Ehrlich suggested that while a handful of slow judges may cause some delay, there is also congestion caused by a lack of judges. "We shall continue to have judicial delays in our state as long as it continues to grow, because the state needs and will need more judges than the legislature is willing to provide."<sup>55</sup> If delay does exist, Justice Ehrlich believes the problem, and therefore the solution lies with the legislature and not the courts.

Evolution of the time standards, from the first recommendations to the publication of the rule, took about two years. During that period, the reason for the standards changed. In 1984, the Committee on Court Statistics and Workload recommended adoption of time standards as a tool to determine the need for judicial re-

51. *Id.* at 423. The court directed the Court Statistics and Workload Committee to make a two-year review of the rule's impact on the state courts and to make recommendations for the supreme court to consider during its cyclical review of the Rules of Judicial Administration. The Committee was responsible for the original draft of Rule 2.085. *Id.* at 423-24.

52. *Id.* at 427 (Ehrlich, J., dissenting) (suggesting time be no longer than six months).

53. *Id.* at 426.

54. *Id.*

55. *Id.* at 428.

sources.<sup>56</sup> In 1986, time standards were adopted as a tool to fight court delay.<sup>57</sup> The idea which was started to help trial judges secure additional resources became a court rule used to evaluate and criticize their performance.

## II. OTHER TIME STANDARDS

Only four other states have officially adopted time standards intended to reduce court delay.<sup>58</sup> Kansas, for example, created time standards applicable to civil trial cases.<sup>59</sup> Although the Kansas times are the shortest—sixty days from filing to disposition for nonjury civil cases; 180 days for nondomestic civil cases with juries<sup>60</sup>—they are the most flexible in application. In striking contrast to the Florida Rule, the Kansas standards set median disposition guidelines rather than individual case disposition times.<sup>61</sup> Thus, as long as half of all cases are disposed of within the time frames, the goal is met.

The Kansas Supreme Court believed that the "local legal culture" was one cause of delay.<sup>62</sup> In brief, this theory holds that delay is more a problem of the attitudes of judges and attorneys than a problem with caseloads or procedures.<sup>63</sup> In the statement of general principles accompanying the Kansas standards, the court stressed that the aim of the courts is justice and the system must be flexible to accommodate cases of varying complexity.<sup>64</sup>

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56. COMMITTEE REPORT, *supra* note 8, at 16.

57. *Time Standards*, 493 So. 2d at 423.

58. The four states are: **Idaho**: *In re Time Standards for Case Processing* Idaho Admin. Order (Oct. 3, 1984) (on file with Clerk, Idaho Supreme Court) [hereinafter Idaho Admin. Order of Oct. 3, 1984]; **Iowa**: *Time Standards for Case Processing*, Iowa Rules of Court (1985); **Kansas**: *Rules Relating to District Courts*, 230 Kan. lxvii (1982) (adopted Dec. 11, 1980); **Texas**: *Time Standards for Disposition of Cases* (Tex. Dec. 3, 1984). Other states have time limits after which cases may be dismissed for lack of progress. Those time limits, however, do not appear to be aimed at reducing court delay so much as putting an end to dilatory tactics of litigants. See, e.g., CAL. CIV. PROC. CODE § 583.420(2)(A) (West Supp. 1987) (may dismiss if action not brought to trial within three years).

59. *Rules Relating to District Courts*, 230 Kan. lxvii (1982) (adopted Dec. 11, 1980).

60. *Id.*

61. *Id.* at lxviii. "The term 'median' as used in these time standards means that at least 50% of the cases subject to judicial determination are tried or disposed of within the established time standards." *Id.*

62. *Id.* at lxvii(7). "Local legal culture consists of the established expectations, practices, and informal rules of behavior of judges, attorneys, and the public." *Id.*

63. *Id.* See generally T. CHURCH, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

64. *Rules Relating to District Courts*, 230 Kan. at lxvi.

Idaho enacted its time standards by court order in October 1984.<sup>65</sup> These standards establish an average maximum time of 540 days for the disposition of civil cases in district courts and 180 days for civil cases heard by magistrates.<sup>66</sup> Like the Kansas court, the Idaho Supreme Court believed that delay was a product of the local legal culture and introduced the time standards in an effort to raise the judges', lawyers', and litigants' expectations for speedy trials.<sup>67</sup> The court explicitly stated the time standards were strictly guidelines; no cause of action or cause for dismissal would result because of a failure to meet them.<sup>68</sup>

The American Bar Association's National Conference of State Trial Judges adopted model time standards in 1984<sup>69</sup> that were different from those adopted by any of the states.<sup>70</sup> The American Bar Association (ABA) standards suggest time goals for a court's entire case load instead of individual cases:

[Ninety percent] of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur.<sup>71</sup>

Like the Kansas standards, the ABA's case load time frames are more flexible than case specific time standards.

65. Idaho Admin. Order of Oct. 3, 1984, *supra* note 58.

66. *Id.* at 2.

67. News Release, "Idaho Courts Adopt Time Standards, Reduce Older Cases" 1 (Oct. 18, 1984).

68. Idaho Admin. Order of Oct. 3, 1984, *supra* note 58, at 2.

69. ABA NATIONAL CONFERENCE OF STATE TRIAL JUDGES, STANDARDS RELATING TO COURT DELAY REDUCTION § 2.52 (1984) [hereinafter NCSTJ STANDARDS]. The opinion adopting Florida's time standards acknowledged the NCSTJ standards and standards proposed by the Conference of State Court Administrators (COSCA). Florida's rule adopted the COSCA time frame, but the court did not explain why. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423 (Fla. 1986).

70. Compare NCSTJ STANDARDS, *supra* note 69, § 2.52 (based on percentage of cases completed within the standards from date of filing), with Idaho: Idaho Admin. Order of Oct. 3, 1984, *supra* note 58 (based on average times from filing date); Iowa: Time Standards for Case Processing, Iowa Rules of Court (1985) (based on individual case times from filing date); Kansas: *Rules Relating to District Courts*, 230 Kan. lxvii (1982) (adopted Dec. 11, 1980) (based on median times from filing date); Texas: Time Standards for Disposition of Cases (Tex. Dec. 3, 1984) (based on individual case times from appearance date).

71. NCSTJ STANDARDS, *supra* note 69, § 2.52.

### III. THE CHANGING PERSPECTIVE OF THE TRIAL JUDGE'S ROLE

The published opinions for and against Rule 2.085 represent different philosophies on the trial judge's role in civil litigation. Justice Ehrlich's dissent states the common law view that trial judges have no interest in the pace of civil litigation.<sup>72</sup> The justices in the majority and concurring opinions expressed what they considered a more progressive view of the trial judge, that of managerial judges controlling all aspects of cases in their courts.<sup>73</sup>

#### A. *The Common Law View of the Trial Judge's Role*

The common law view of the trial judge's role in civil litigation is that "[t]he parties should control the progress of the litigation."<sup>74</sup> In short, the trial judge has no role "except to provide a forum and a procedure for fairly adjudicating conflicts between [the] parties."<sup>75</sup>

The source of the common law view is unclear. Justice Ehrlich wrote that the classical view has been present "since the founding of the Republic,"<sup>76</sup> but cites no authority. Although the source of the passive judiciary is evasive, recognition of it as a common law concept is not. Roscoe Pound recognized the passive judiciary as an entrenched common law concept in his address to the American Bar Association in 1906:

[I]n America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice.<sup>77</sup>

Clarence Callender also recognized the common law idea of a passive judiciary in 1927 when he wrote that "the paramount objective

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72. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423, 426 (Fla. 1986) (Ehrlich, J., dissenting).

73. *Id.* at 423.

74. *Id.* at 426 (Ehrlich, J., dissenting).

75. *Id.*

76. *Id.*

77. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 JUDICATURE 178, 182 (1936). Pound's statement, however, was not in praise of the passive judiciary. He referred to this common law concept as a "contentious procedure" and a "po-tent source of irritation." *Id.*

of the [early] law was to place the machinery [of justice] at the disposal of the litigant."<sup>78</sup>

In Florida, Justices Ehrlich and Shaw are not alone in their support of the common law role of judges. Prior to the enactment of Rule 2.085, the Conference of Circuit Court Judges for the Seventh Judicial Circuit of Florida passed a resolution opposing the pending change.<sup>79</sup> The resolution stated that the change "would accomplish nothing other than taking the court system away from lawyers and placing the responsibility for moving cases upon the judges."<sup>80</sup> On the national scene, as in Florida, many proponents of the passive judiciary express their endorsement of the common law judge through criticism of the managerial judge concept.<sup>81</sup>

### B. *The Managerial Judge*

The view that judges should manage the pace of litigation is diametrically opposed to the common law view that lawyers should control the pace of litigation. The name most often given to this active judiciary is the managerial judge.<sup>82</sup> Although a complete examination of the managerial judge is beyond the scope of this Comment, a few observations are in order.

First, the managerial judge is often held out as a solution, or at least a partial solution, to the real or perceived problem of court delay.<sup>83</sup> The American Bar Association determined that "a sizeable body of research has established that the leading cause of delay has been the failure of judges to maintain control over the pace of litigation."<sup>84</sup> Based on this finding, the Association endorsed the managerial judge concept by adopting Standard 2.50 of the ABA Standards Relating to Trial Courts. Standard 2.50 provides that "the court, not the lawyers or litigants, should control the pace of litigation."<sup>85</sup> The accompanying commentary explains that

78. C. CALLENDER, *AMERICAN COURTS, THEIR ORGANIZATION AND PROCEDURE* 222 (1927).

79. Resolution (Fla. 7th Cir. Ct. u.d.) (on file, *Florida State University Law Review*).

80. *Id.*

81. See Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGES' J., Winter 1984, at 8; Comisky, *Declare an End to Judicial Quotas*, 36 FED. B.J. 30 (1977).

82. Resnik, *supra* note 81, at 9.

83. See e.g., Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978); Quinn, *The Bottom Line*, 9 ST. CT. J. 8 (1985); NCSTJ STANDARDS, *supra* note 69, at 2 introduction.

84. NCSTJ STANDARDS, *supra* note 69, at 6.

85. *Id.*, at 5.

"[e]radicating delay depends on adherence to this one axiom: The court must take the initiative to eliminate the causes of delay."<sup>86</sup>

Secondly, the power of a trial judge to assume a managerial role is inherent; it need not be mandated by court rule. The United States Supreme Court has recognized the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."<sup>87</sup> With such inherent power, any rule regarding time standards may in fact limit judges' power to the extent it specifies how that power shall be used.

Finally, the idea (if not the practice) of the managerial judge is not new. An alternative to the passive judiciary was contemplated by Roscoe Pound in 1906.<sup>88</sup> The official practice of the managerial judge, however, is fairly new. The federal court system did not incorporate active judicial involvement in pretrial activities into the Rules of Civil Procedure until Rule 16 was amended in 1983.<sup>89</sup> The rule specifically allowed the judge to establish "early and continuing control so that the case will not be protracted because of lack of management."<sup>90</sup> The amended rule was designed to shift "the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase."<sup>91</sup> The advisory committee commented that "when a trial judge intervenes personally at an early stage to assume judicial control over a case . . . the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."<sup>92</sup> This early judicial intervention was embraced by the advisory committee as necessary to meet the "challenges of modern litigation."<sup>93</sup> The rule gives judges the

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86. *Id.* at 6.

87. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (judicial power to stay proceedings incidental to inherent power to control case disposition).

88. Pound, *supra* note 77, at 178.

89. FED. R. CIV. P. 16 (1983). Until 1983, judges could hold pretrial hearings under Rule 16 but were limited to considering matters at trial. The pace of litigation before trial was still in the hands of lawyers. *See* FED. R. CIV. P. 16 (1938). Prior to 1984, Florida's pretrial procedure closely followed the 1938 Federal Rule 16. FLA. R. CIV. P. 1.200 (1972). Florida amended its pretrial rule in 1984, but did not grant the same broad managerial powers as the federal amendment. *Compare* FLA. R. CIV. P. 1.200, *with* FED. R. CIV. P. 16. Apparently, Florida was not quite ready to propel its judges into the managerial role.

90. FED. R. CIV. P. 16(a)(2).

91. *Id.* 16 advisory committee's note.

92. *Id.* advisory committee's note (1983 amendment).

93. *Id.*

discretion to order pretrial conferences if needed<sup>94</sup> and the ability to sanction parties who disobey pretrial orders.<sup>95</sup> Thus, both the spirit and letter of the rule grant to judges the flexibility to make decisions and authority to enforce them. This gives teeth to the managerial philosophy. The federal rules impose no specific time standards.

Idaho also introduced the managerial judge philosophy through its rules of civil procedure. Idaho's Rule 16 gives trial judges the same discretion to schedule pretrial conferences and sanction parties as the federal rule.<sup>96</sup> Although Idaho's rules of civil procedure do not mention time standards, the state's supreme court implemented specific time standards through an administrative order. Unlike Florida, however, Idaho adopted "*guidelines* for judges, lawyers, and litigants"<sup>97</sup> instead of rigid time limits. Thus, Idaho's separate implementation of the managerial philosophy gives judges great discretion, while the time standards guide them in managing cases.

The widespread acceptance of the managerial judge as an answer to the problem of court delay, along with its novelty, has resulted in a scarcity of practical criticism on the subject. Professor Judith Resnik, however, has articulated some thoughtful and concise concerns.<sup>98</sup> One concern is that efforts to create managerial judges may hinder rather than improve the quality of justice. Judges may become more concerned with statistics on their performance than with the quality of their decisions.<sup>99</sup> With time standards, this may be an especially poignant problem. Under a system where individual judges may be identified by their statistical batting averages, the system may indeed lead to an unbalanced concern for statistics over the quality of justice.

A related concern is that managerial judges may provide fewer procedural safeguards to the litigating parties.<sup>100</sup> In an effort to expedite cases, judges may use informal meetings or ex parte communications with the parties. During informal meetings, information not allowed in the courtroom via rules of evidence may be heard by

94. FED. R. CIV. P. 16(a). Drafters of Rule 16 realized that pretrial conferences may not be necessary in "run-of-the-mill cases" and may result in "needless expense to a client." *Id.* advisory committee's note.

95. *Id.* 16(f).

96. Compare FED. R. CIV. P. 16, with *Idaho* R. Civ. P. 16.

97. *Idaho* Admin. Order of Oct. 3, 1984, *supra* note 58, at 1 (emphasis added).

98. Resnik, *supra* note 81, at 8.

99. *Id.* at 10.

100. *Id.*

judges, perhaps biasing their opinions. Decisions made by judges may be undocumented or off-the-record and, thus, not reviewable by appellate courts.<sup>101</sup> Finally, when the same judge presides over informal meetings and the trial, attorneys may not vigorously oppose decisions made in the informal setting for fear of alienating the judge at trial.<sup>102</sup> These inherent problems with informality may dilute the procedural safeguards afforded the parties in a formal trial setting.

A final concern voiced by Professor Resnik particularly applicable to time standards is the unknown cost of managerial judging. Managerial judges involved with collecting data, meeting with parties before trial, and concentrating on other managerial duties may be using time better spent in adjudicating cases.<sup>103</sup>

Professor Resnik's opposition to managerial judging is logical and articulate. Nevertheless, her arguments must be viewed as reasoned concerns and not proven criticisms.<sup>104</sup> The Florida Supreme Court has adopted the managerial judge as the model for Florida courts. The supreme court should keep Professor Resnik's concerns in mind when it reviews that philosophy in practice.

#### IV. LIMITS ON THE COURT'S INHERENT POWER

The question remains whether imposition of specific time standards helps or hinders the Florida Supreme Court's implementation of the managerial judge philosophy. Florida judges have always possessed sufficient inherent power to manage cases.<sup>105</sup> What they lacked was a directive telling them to exercise that power. The supreme court provided such a directive in Rule 2.085, but may in fact have limited judges' inherent power by also including rigid time constraints. The rule's presumption of reasonableness and continuance language appear to take away the judge's discretion to tailor the pace of litigation except in unusual circumstances.<sup>106</sup> Ideally, a managerial judge should have discretion to determine the proper pace for each case, regardless of whether the case takes three months or three years to complete. In addition, the Florida rule imposes no sanctions, and it is unclear whether

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101. *Id.* at 54.

102. *See id.*

103. *Id.* at 11, 54.

104. *Cf. Connolly, Why We Do Need Managerial Judges*, 23 JUDGES' J., Fall 1984, at 34.

105. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (judicial power to stay proceedings incidental to inherent power to control case disposition).

106. *See supra* notes 44-47 and accompanying text.



circuit court judges may impose existing sanctions for court delay when litigants fail to meet the standards. Without the ability to sanction, judges may be responsible for meeting mandated time limits yet possess no authority to meet them.<sup>107</sup>

The rule's reporting requirements may improperly influence judges' decisions. Under the rule, statistics are generated and published quarterly on the number of cases in each circuit that meet and exceed the time standards. Individual case numbers are reported for cases exceeding the standards,<sup>108</sup> making it possible to identify individual judges and their statistical batting averages. This system may lead to an unbalanced concern for statistics over the quality of justice.<sup>109</sup> Morale problems also may result if judges resent the use of time standards as a measure of their performance.

The Supreme Court of Florida did not mention managerial judges in its majority opinion, but justified adoption of the rule implementing the managerial judge philosophy as a means of resolving the problem of court delay.<sup>110</sup> The jury is still out on whether the rule will decrease court delay,<sup>111</sup> but the rule probably

107. Other states such as Idaho do not impose sanctions for failure to meet their time standards. Idaho explicitly states that failure to meet the standards will not create a reason for dismissal or cause of action. Idaho Admin. Order of Oct. 3, 1984, *supra* note 58, at 1. However, it does not appear that those states' judges will be held specially accountable for failing to meet the guidelines. In Florida, the reporting system flags individual cases (and, therefore, potentially identifies individual judges) which exceed the presumptively reasonable standards. Fla. Admin. Order of Sept. 20, 1985, *supra* note 18, at 2.

108. Fla. Admin. Order of Sept. 20, 1985, *supra* note 18 at 2. For civil cases exceeding the time standards, the report must list the case number, case style, type of case and filing date. *Id.* at 2.

109. Further exacerbating the undue concern with statistics is the fact that the statistics may not reflect a judge's true success in combating court delay. The reporting procedures only keep track of whether individual cases met the required time standard. No overall reduction of median case times is reported, meaning each case stands or falls on its own. Under these reporting requirements, judges implementing case management procedures can decrease the overall time in which cases are disposed yet show an increase in the percentage of cases exceeding the standards.

110. The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So. 2d 423 (Fla. 1986).

111. In the brief period Rule 2.085 has been in effect, statistics indicate that neither the managerial philosophy nor the time standards themselves have had an immediate impact on the pace of litigation. The first Pending Caseload Summary Report showed that 75% of civil jury cases statewide were completed in the 18-month time frame. By the third quarter, this figure dropped to 73.3%, and to 72.5% in the fourth quarter. Florida State Court System Pending Caseload Report Summary (first quarter, 1986); Office of the State Courts Adm'r Mgmt. & Coordination Unit, Florida State Court System Pending Caseload Report Summary for First Quarter Ending March 31, 1986 (on file with State Courts Administrator, Florida Supreme Court); Office of the State Courts Adm'r Mgmt. & Coordination Unit, Florida State Court System Pending Caseload Report Summary for Quarter Ending September 30, 1986 (on file with State Courts Administrator, Florida Su-

was the wrong tool for implementing the managerial judge philosophy. The rule is internally inconsistent: it directs judges to use their broad discretion and power to manage cases, while limiting that power by setting rigid time standards. Furthermore, the court's attempt at implementing the philosophy through time standards may backfire because of judicial resistance to the standards. A better approach would be to implement managerial judging without time standards—the federal approach—or implement the managerial judge philosophy separately from flexible time guidelines—the Idaho approach.

## V. CONCLUSION

The Florida rule on time standards mixes the implementation of managerial judge philosophy with imposition of ideal time limits for disposition of civil cases. This mixture produces a system where judges have little discretion to truly manage the pace of litigation and where statistics play an increasingly important role in evaluating the effectiveness of judges and their courts. Ultimately, this may lead judges to equate the time required to dispose of cases with the quality of justice meted out.

The true result of using time standards to implement the managerial judge philosophy may be a decrease in procedural safeguards which promote justice. Forcing judges to act within the confines of a time standard will pressure them to seek less formal procedures in order to expedite the litigation process. The Florida Supreme Court should be wary of this danger when evaluating the practice of the managerial judge philosophy.

